

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2021-03798

XXXXXXXXXXXXXX

**COUNSEL:** NONE

**HEARING REQUESTED:** NO

### APPLICANT'S REQUEST

His election of benefits under the Reserve Component Survivor Benefit Plan (RCSBP) be changed. Specifically, to convert spouse coverage to former spouse coverage.

### APPLICANT'S CONTENTIONS

His RCSBP has his current spouse listed as the beneficiary. He has always selected his former spouse for RCSBP and needs the change to be made to be in compliance with his divorce decree. It has always been his desire to have his former spouse covered. He completed all the forms and retirement paperwork under direct guidance of the Air Reserve Personnel Center (ARPC). If any error was made, it was not intentional. This benefit should go to his intended beneficiary.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The applicant is a retired Air Force Reserve colonel (O-6) receiving retired pay.

On 18 Jul 05, ARPC/DPPR sent the applicant the standard notification of eligibility (NOE) for retired pay (20-year letter) informing him he has completed the required years under the provisions of Title 10 United States Code, Section 12731 (10 U.S.C. § 12731) and entitled to retired pay upon application prior to age 60. In addition, he was eligible to participate in the RCSBP and should receive detailed RCSBP information by certified mail within 60 days.

On 7 Oct 05, according to ARPC Form 123, *Reserve Component Survivor Benefit Plan Election Certificate*, the applicant elected Option C, *Immediate Annuity for spouse and children*, based on full retired pay.

On 19 Dec 12, the applicant and his former spouse divorced. The divorce decree required the applicant to provide RCSBP coverage for his former spouse. As of 18 Dec 13 [one year after divorce], the applicant had not filed a change to his RCSBP election under 10 U.S.C. § 1448(b)(3)(A)(iii), nor had his former spouse filed a deemed election under 10 U.S.C. § 1450(f)(3)(C).

On 1 May 14, according to Reserve Order XXXXX, dated 27 Aug 13, the applicant was assigned to the Retired Reserve Section and placed on the Air Force Reserve Retired List.

On 29 May 15, according to a Certificate of Marriage, provided by the applicant, he married his current spouse.

On 29 Oct 21, according to Reserve Order XXXXX, dated 20 Sep 21, the applicant was retired, authorized pay per 10 U.S.C. § 12731, and placed on the USAF Retired List.

On 29 Jun 22, the Board sent the applicant the following standard forms, in order to establish whether there are persons with competing interests in the case or who should receive notice of the requested correction to the record: SBP Release of Benefits Affidavit (Current Spouse).

On 8 Jul 22, the applicant returned the completed affidavits. The applicant's current spouse signed an affidavit stating she understood the applicant's intention to comply with a court order naming the applicant's former spouse as the SBP beneficiary.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisories at Exhibits C and E.

## **APPLICABLE AUTHORITY**

DoD 7000.14-R, *Financial Management Regulation*, Volume 7B, Chapter 540401. "Any member who is notified of his or her completion of the years of service required for retired pay eligibility for non-regular retirement may elect to participate in RCSBP before the end of the 90-day period. A member who is married or has a dependent child, and who receives notice of eligibility for retired pay, after January 1, 2001, is automatically an immediate participant in RCSBP unless the member elects (with spousal concurrence, if required) not to participate or to defer the decision or delay coverage before the end of the 90-day period."

10 U.S.C. § 1448(b)(3)(A)(iii). "An election to convert spouse coverage to former spouse coverage, "must be written, signed by the person making the election, and received by the Secretary concerned within one year after the date of the decree of divorce, dissolution, or annulment."

10 U.S.C. § 1450(f)(3)(C). If a court has ordered a service member to elect former spouse SBP, then a former spouse can submit his or her own request to DFAS for former spouse SBP coverage. This is known as a "deemed election request." There is a time limit: "An election may not be deemed to have been made ... unless the Secretary concerned receives a request from the former spouse of the person within one year of the date of the court order or filing involved."

DoDI 1332.42, Survivor Benefit Plan:

### **4.4. MAKING OR CHANGING AN ELECTION AFTER RETIREMENT OR NOE.**

#### **a. General.**

(1) A member will have an opportunity to change an election in certain circumstances as described in this paragraph.

(2) Once spouse coverage is established at retirement or at NOE, or in certain circumstances after retirement or NOE in accordance with this section, spouse coverage remains in effect unless changed by a specific provision of law that allows or requires such change.

(3) A spouse becomes ineligible as a beneficiary, and coverage is suspended, upon:

(a) Death of the spouse; or

(b) Divorce, dissolution, or annulment of marriage. It is important to note

that transition from spouse coverage to former spouse coverage is not automatic upon divorce, dissolution, or annulment. Former spouse coverage must be elected in accordance with Section 5. A member who elects to provide former spouse coverage pursuant to a requirement contained in a court order or written agreement may not change or discontinue such coverage unless the applicable requirements of Section 5 have been satisfied. Failure to elect former spouse coverage in accordance with a court order, written agreement, or voluntary agreement will result in suspended spouse coverage.

## **AIR FORCE EVALUATION**

ARPC/DPTT recommends granting the application. The applicant has a court-ordered divorce decree that states his former spouse is the beneficiary to the Survivor Benefit Plan. All Reserve Component service members who are eligible to participate in RCSBP, but who fail to make an election in the prescribed time will, by law, automatically have full, immediate RCSBP coverage for their dependent spouse and/or children, based upon dependents in the member's record in the Military Personnel Data System (MilPDS). The prescribed time limit for RCSBP election is before the end of the 90th day after the service member receives notification of having completed the years of service to be eligible for non-regular retirement in accordance with 10 U.S.C. § 12731.

On 26 Apr 05, the applicant completed 20 satisfactory years of service; however, the RCSBP NOE takes approximately 120 days for members to receive as there is a delay in the Point Credit Summary (PCARS) to reflect the 20 satisfactory years in record. The applicant signed and submitted the ARPC Form 123, with the election of Option C, with spouse and child(ren) listed as the beneficiaries effective 7 Oct 05.

In accordance with DoDI 1332.42, paragraph 5.1a, a former spouse is eligible as a beneficiary if: (1) member voluntarily elects them as part of, or incident to, a proceeding of divorce, dissolution, or annulment, or (2) pursuant to the requirements of a court order or a written agreement subsequent to a proceeding of divorce, dissolution or annulment. On 19 Dec 12, the applicant's divorce was finalized. Page 12 of the divorce decree states, "Upon Husband's sixtieth (60th) birthday, Wife is entitled to 50% of his United States Air Force Retirement by law. Wife is entitled to any applicable surviving spouse benefit; the parties shall divide equally any cost associated with said benefit or agree to an equal reduction in monetary benefit to each part in connection with the surviving spouse benefit."

The complete advisory opinion is at Exhibit C .

## **APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 23 Aug 22, for comment (Exhibit D) but has received no response.

## **ADDITIONAL AIR FORCE EVALUATION**

ARPC/DPTT recommends granting the application. The advisory was amended to correct a reference, without change in recommendation and/or rationale. In accordance with DoDI 1332.42, paragraph 5.2: (1) A member who elected spouse coverage upon becoming eligible to participate in SBP or RCSBP, and later divorces, may elect to cover that former spouse (who was not the member's former spouse at the time the member became eligible to participate) within one year after the date of decree of divorce, dissolution, or annulment; (2) Former spouse coverage is not automatic upon divorce, dissolution, or annulment. A court order alone does not create coverage. On 19 Dec 12 the applicant's divorce was finalized. Page 12 of the divorce decree states, "Upon Husband's sixtieth (60th) birthday, Wife is entitled to 50% of his United States Air Force Retirement by law. Wife is entitled to any applicable surviving spouse benefit; the parties shall divide equally any cost associated with said benefit or agree to an equal reduction in monetary benefit to each part in connection with the surviving spouse benefit."

The complete advisory opinion is at Exhibit E.

## **APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 23 Aug 22, for comment (Exhibit G) but has received no response.

### **FINDINGS AND CONCLUSION**

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board concludes the applicant is the victim of an error or injustice. The Board concurs with the rationale and recommendation of the ARPC/DPTT advisory dated 30 Dec 22, and finds a preponderance of the evidence substantiates the applicant's contentions. The divorce decree reflects the applicant's intention to elect his former spouse as beneficiary and the signed release by his current spouse reflects their agreement. Therefore, the Board recommends correcting the applicant's records as indicated below.

### **RECOMMENDATION**

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show that:

a. On 18 Dec 13, he submitted a timely and effective election for former spouse coverage under the Reserve Component Survivor Benefit Plan, based on full retired pay, naming FORMER SPOUSE as the eligible beneficiary.

b. Approval should be contingent upon recovery of Survivor Benefit Plan premiums owed since his 29 Oct 21 retirement. If applicable, the monthly survivor benefit annuity will be applied to the premium debt until the total amount of premiums owed is recovered.

### **CERTIFICATION**

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2021-03798 in Executive Session on 16 Feb 23:

, Panel Chair  
, Panel Member  
, Panel Member

All members voted to correct the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 9 Nov 21.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Advisory, ARPC/DPTT, dated 15 Aug 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 23 Aug 22.
- Exhibit E: Advisory, ARPC/DPTT, dated 30 Dec 22.
- Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 30 Dec 22.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

X

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Board Operations Manager, AFBCMR